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IN THE

Supreme Court of the United States

October Term 1955

SAUL HENRY DAVIS, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR COMMON-LAW WRIT OF CERTIORARI AND PETITION FOR A COMMON-LAW WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR COMMON-LAW WRIT OF CERTIORARI

The petitioner, Saul Henry Davis, Jr., by his attorneys, A. Jerome Hoffmann and John W. Graff, moves the Court for leave to file the attached petition for a common-law writ of certiorari to the United States Court of Appeals for the Eighth Circuit and in support of said motion states as follows:

On January 23, 1956, the opinion of the United States Court of Appeals for the Eighth Circuit was rendered and on the same date judgment was entered in said cause by the Clerk of said United States Court of Appeals for the Eighth Circuit. That the petitioner in this case lives in Minot, North Dakota and his attorneys in this matter live and have their offices in St. Paul, Minnesota. That because of the distances involved between these two points and because of illness it was not possible to fully consider whether a petition for certiorari would be made in this case. That under Rule 22(2) of this Court the time within which the petition for

certiorari should have been filed was February 23, 1956 to comply with the thirty day period but under the same rule if an extension would have been requested and granted for the maximum period, the time for filing would have been March 24, 1956. That it is believed that the one point which is presented by the petition is meritorious and that the petitioner should not be deprived of the opportunity of presenting his petition. That the reason why the petition was not filed within the thirty day period or the reason an extension was not obtained in no way was the fault or neglect of the petitioner. Wherefore, it is respectfully urged, pursuant to Rule 31(2) of this Court, that the petition for a common-law writ of certiorari be permitted to be filed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1955

SAUL HENRY DAVIS, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A COMMON-LAW WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a common-law writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on January 23, 1956

CITATION TO OPINIONS BELOW

There was no opinion of the District Court. The opinion of the Court of Appeals for the Eight Circuit, printed in the Appendix, is as yet unreported. The dissenting opinion of Circuit Judge Van Oosterhout, printed in the Appendix, is as yet unreported.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on January 23, 1956. The jurisdiction of this Court is invoked under 28 United States Code 1651(a).

QUESTION PRESENTED

Whether petitioner was deprived of a fair trial in permitting the petitioner to be cross-examined as to his wife's alleged offenses where the wife was not a party or a witness in the action.

STATUTES INVOLVED

The statutes under which the petitioner was prosecuted are as follows:

18 United States Code 2422:

> "Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

18 United States Code 2:

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

"(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

18 United States Code 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

Petitioner was indicted in the United States District Court for the District of Minnesota on September 9, 1954. The first count charged petitioner and one Wallace C. Anderson with a substantive violation of the Mann Act, 18 U. S. C. 2421; the second count charged Wallace C. Anderson only with another substantive violation of the Mann Act; while the third count charged both petitioner and Anderson with a conspiracy to violate the Mann Act. Petitioner was tried alone. The facts, insofar as they bear on the sufficiency of the evidence to sustain the conviction are set forth in the majority opinion. However, the sufficiency of the evidence to sustain the conviction was not challenged in the Court of Appeals. Only so much of the factual situation as will put petitioner's position in proper focus will be set forth herein.

The alleged illegal transportation and conspiracy were in July, 1954 (R. 1-3). Petitioner took the stand in his own behalf (R. 51-60, 70-76) and was cross-examined at considerable length (60-70, 76). During the cross-examination of petitioner, the following questions were asked and the proceedings were had.

R. 64-65:

"Q. When were you married?

A. 1930.

Q. To Ann?

A. To Ann M. Davis.

Q. Ann what?

A. Ann M. Davis.

Q. Since that time?

A. Since that time.

Q. And you have been living with her in Minot since you been in Minot since 1942?

A. That's right.

Q. And what has been her occupation at Minot since 1942 on?

A. Well, when we first got there she was cleaning up office buildings and doing the house work and helping me dig basements and do carpenter work.

Q. What else, how else did she earn money?

A. What do you mean?

Q. I am asking you.

A. I don't know what you mean.

Q. Well, did she engage in prostitution?

A. I don't think so.

Q. You don't think so?

A. I don't think so.

Q. You don't know?

A. I know, yes.

Q. Do you or do you not know whether she engaged in prostitution?

A. Yes, I know.

Q. Did she?

A. No.

Q. I believe in 1950 or 1951 in Minot, North Dakota, wasn't Ann arrested for prostitution?

Mr. Tautges: Just a moment, I object to that as improper question and having nothing to do with the cross-examination and prejudicial and I move a mistrial be adjudged.

The Court: Read the question, please.

(Question read.)

The Court: Overruled.

By Mr. Dim:

Q. Isn't that right?

Mr. Tautges: I wish to make the further objection, Your Honor, that it's immaterial.

The Court: Overruled on that too. It isn't immaterial. He has absolutely given her a clean bill of health. Now, let's see what he says on this.

By Mr. Dim:

Q. Talking about your wife, she was arrested and convicted for engaging in prostitution?

A. She was not.

Q. She was not?

A. No."

R. 66-70:

Q. "Isn't it a fact, Mr. Davis, that on May 1, 1950, Ann Davis, Mrs. Saul Davis, pled guilty in Court in Minot, North Dakota, of keeping a disorderly house at 318 Third Street Southwest, Minot, North Dakota?

A. I was in Hobbs, New Mexico.

Q. Where were you?

A. I was in Hobbs, New Mexico.

Q. You were in Hobbs, New Mexico?

A. That is right.

Q. You knew nothing about that?

A. That is right.

Q. Where were you on July 27, 1950, this other date was May 1, 1950, July 27, 1950, where were you?

A. That I can't say.

Q. Well, isn't it a fact that Ann M., is that her middle initial?

Mr. Tautges: No. Just referring to arrests and particularly someone not the witness.

The Court: You are objecting to the whole subject matter as to whether his wife has ever been arrested for prostitution?

Mr. Tautges: Yes.

The Court: Well, I am overruling you.

Mr. Campbell: Your Honor—

The Court: I have ruled on this, Mr. Campbell.

Mr. Campbell: Oh, I see.

By Mr. Dim:

Q. On July 27, 1950, isn't it a fact that Ann M. Davis, your wife, was arrested for prostitution?

A. I was in Hobbs, New Mexico.

Q. That was July 27th. On May 1, 1950, didn't your wife plead guilty for the operation of keeping a disorderly house at 318 Third Street Southwest?

A. I was in Amarillo, Texas.

Mr. Tautges: Just a minute.

Mr. Dim: O.K.

Mr. Tautges: We have the same objections, Your Honor, as to these other questions about any arrests.

The Court: Same ruling.

By Mr. Dim.

Q. So in those two instances you don't know what your wife was doing because you were elsewhere?

A. I was in Amarillo, Texas, and Hobbs, New Mexico.

Q. But otherwise, isn't it a fact when you were home, Minot, North Dakota, your wife was engaged in prostitution?

A. No, that is not right.

Q. She has never to your knowledge and you do not know she has ever been engaged in prostitution since she has been your wife?

A. That is right.

The Court: When did he say he was married?

The Witness: 1938.

The Court: What are the dates of these?

Mr. Dim: 1950, Your Honor, 1950.

The Court: All in 1950?

Mr. Dim: Well, two that I have put in the record specifically in 1950.

Mr. Tautges: I object to the last remark because what the attorney for the Government is reading from is not in the record and not in evidence.

Mr. Dim: Do you want to put these in evidence?

Mr. Tautges: I don't want to put your case in evidence, Mr. Dim. I am simply making an objection.

Mr. Dim: You are welcome to put these in.

Mr. Tautges: I wish to take further exception to the remarks of the Government attorney about my putting his case in. I think that the jury ought to be instructed it's the duty of the Government's own attorney to put their case in.

The Court: What are those instruments that you have there that prove this thing?

Mr. Dim: These are police records, Your Honor.

The Court: Police records. Why don't you put them in evidence?

Mr. Dim: I will when the proper time comes, Your Honor.

The Court: Oh, all right.

Mr. Dim: I am just giving the witness an opportunity to testify from his own knowledge."

At this point the redirect examination of the petitioner was started (R. 70) and then proceedings were had in Chambers and out of the presence of the jury (R. 70-75). Counsel

for petitioner moved to strike out any testimony about the convictions of petitioner's wife. In the discussion in Chambers it was apparent that at that time the trial Court was of the opinion that the cross-examination was proper[1] and it was only a question of whether the government had the necessary proof. The redirect examination of petitioner was then resumed in open Court during which examination the petitioner testified that his wife had once been charged with prostitution and she was acquitted (R. 75). Counsel for the government upon recross examination again asked about the prostitution activities of petitioner's wife (R. 76). The Court at this point reversed itself and sustained an objection to this question and stated "The jury will disregard it all" (R. 76).[2] Later in the trial proceedings were had (R. 82-90) before the Court out of the presence of the jury when government counsel made an extensive offer of proof to show the activities of the wife of the petitioner through the cross-examination of petitioner. After considerable discussion by counsel on both sides the Court withheld a ruling on the offer of proof and told counsel to go ahead with other matters (R. 90). The defense then rested, the government adduced rebuttal testimony (R. 90-96) and after both sides had rested the Court denied the government's offer of proof (R. 96).

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[1]The Court: It becomes material and relevant because Mr. Dim asked him if she wasn't a prostitute and he swore she was not, and now you are putting in a whole flood of evidence to the effect she was. She pled guilty to it. (R. 73).
The Court: Well, if he was living in Minot he ought to have known about it. He is presumed to know what everybody else in the community knows when it gets into the papers and police magistrates and local police officers know about it, he is supposed to know about it. (R. 74)

[2]Following this statement the following took place (R. 76): "Mr. Tautges: Will Your Honor advise the jury to disregard it?
The Court: I just said that. I am going to treat this record as is, not as you may hope to prove it."

In the instructions to the jury, the Court instructed the jury to disregard the testimony (R. 97-98) but what was said probably aggravated the situation rather than relieved it.[3] During his direct testimony, the only reference that petitioner made to his wife were: that he was married and the name of his wife (R. 51); that his wife helped him fix up old property (R. 52); where his wife lived (R. 57); that during June and July she would help in the barbecue and sometimes stayed until it closed (R. 57); that petitioner and his wife owned the properties jointly; and that his wife was sick during part of the trial and was in the hospital (R. 59).

The petitioner was sentenced to a period of 4½ years on the first count and imposition of sentence on the third count was suspended and the petitioner was put on probation for a period of five years, said probationary period to commence after service of the sentence on the first count (R. 109).

REASONS FOR GRANTING THE WRIT

The case involves an important problem in the administration of criminal justice in the federal courts. The decision below offers the government the tempting opportunity to engage in what it knows or should know is improper cross-examination and thereafter claim that the improper cross-examination did not affect the jury's verdict. The decision below also bears upon the duty of a trial court to protect a witness from questions "which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him."[4]

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[3]The instructions on this point were as follows:
"You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the Court. Such evidence is to be treated as though you never had heard it, particularly the testimony with reference to the wife of the defendant being arrested for prostitution, which was admitted by the Court and afterwards stricken out."

[4]Alford v. U. S., 282 U. S. 687, 694.

It is interesting to note that the trial court[5], the majority opinion of the Court of Appeals,[6] the dissenting opinion of Circuit Judge Van Oosterhout[7] all recognize that the cross-examination complained of was improper.[8] Under these circumstances we are proceeding on the assumption that it is now well settled that the cross-examination was improper. The basic and controlling question that remains is whether the improper cross-examination deprived petitioner of a fair trial. On this point two judges of the Court of Appeals have held that it did not, while one judge of the Court of Appeals held that it did. Thus by the slimmest of judicial margins, petitioner is to be deprived of his liberty for a substantial period of time. It is pertinent then to inquire whether there is a suitable standard or criterion existing in the federal courts to govern situations of this kind. The view has been expressed by this Court that in such situations one must ponder whether an appellant's right was substantially affected by an error and in that case, *Kotteakas v. United States*, 328 U. S. 750, 764, 765, the late Mr. Justice Rutledge stated it as follows:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. Bruno v. United States, supra (308 US at 294, 84 L. ed. 260, 60 S. Ct. 198). But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is im-

[5]R. 76, 96-98.
[6]Appendix, p. 10.
[7]Appendix, p. 15.
[8]The government in its brief in the Court of Appeals contended that the testimony was properly admissible.

possible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

This states a subjective test except when the departure is from a constitutional norm or a specific Command of Congress. The Court of Appeals for the Eighth Circuit has previously and on a number of occasions has reversed convictions on the basis of the government having engaged in improper cross-examination. This was done on the basis that where the only purpose of an unfair and improper cross-examination is to degrade the defendant and prejudice the jury against him the government on appeal will not ordinarily be heard to say that the methods employed did not have the effect they were intended to have. See *Salerno v. United States,* 61 F. 2d 419, 424, *Eckert v. United States,* 188 F. 2d 336, 341 and *Havenor v. United States,* 15 F. 2d 503, 507. Indeed the Court of Appeals for the Eighth Circuit has held in *Harrold v. Territory of Oklahoma,* 169 Fed. 47, that a party on whose behalf a witness is called has the right to restrict his cross-examination to the subject of his direct examination and a violation of that right is reversible error. There were three separate and distinct occasions when government counsel interrogated petitioner concerning the arrests of the wife of the petitioner. Under the rule of *Harrold v. Territory of Oklahoma,* supra, one of such occasions was enough to constitute prejudicial error. Thus, at least in the Eighth Circuit, the difficulty petitioner finds himself in, is not the absence of a rule which would seem to be controlling, but rather the absence of the exercise of the rule that does exist.

We submit that this is a consequence of a situation where no standard or rule has been promulgated by this Court.

The situation that existed before *Bruno v. United States*, 308 U. S. 287, has been apparently solved by the decision in that case. It is settled law as the result of that decision that an accused has the indefeasible right to have the jury instructed by the Court that his failure to testify does not create any presumption against him. The situation that existed before *McNab v. United States*, 318 U. S. 332 has been set at rest the admissibility of evidence secured under certain conditions and ever since arresting officers have promptly taken the person arrested before the nearest United States Commissioner. These determinations have been made within the orbit of the power in this Court of judicial supervision of the administration of criminal justice in the Federal Courts. See *Nardone v. United States*, 308 U. S. 338. That these determinations could be based upon the due process clause of the Constitution is undoubted but such recourse is not necessary in view of such power of judicial supervision.

We submit that the instant case points up the desirability of a rule, standard or criterion which could be applied objectively to all cases. We submit that a rule would be desirable which would hold that in the prosecution of a defendant, counsel for the government indulges in unfair and improper cross-examination, the only purpose of which is to degrade the defendant and prejudice the jury against him, the error is such as warrants a new trial. Such rules will do much toward correcting the evil apparent in this case and many other cases where the circumstances are not dissimilar.

CONCLUSION

For the foregoing reasons it is respectfully urged that the requested writ of certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

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APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,228.

Saul Henry Davis, Jr., Appellant, vs. United States of America, Appellee.	Appeal from the United States District Court for the District of Minnesota.

[January 23, 1956.]

John W. Graff (Jerome Hoffmann and Hoffmann, Donahue & Graff were with him on the brief), for Appellant.

Alex Dim, Assistant United States Attorney (George E. MacKinnon, United States Attorney, was with him on the brief), for Appellee.

Before SANBORN, JOHNSEN and VAN OOSTERHOUT, Circuit Judges.

SANBORN, Circuit Judge.

Saul Henry Davis, Jr., and Wallace C. Anderson were, on September 9, 1954, charged jointly, by indictment, with two offenses. In the first count of the indictment they were

charged with having knowingly, on or about July 8, 1954, persuaded and induced a woman to go by common carrier from Minneapolis, Minnesota, to Minot, North Dakota, for the purpose of prostitution. (Sec. 2422, Title 18 U.S.C.A.) The third count charged that Davis and Anderson, on or about July 7, 1954, at Minneapolis, Minnesota, conspired to commit the offense charged in the first count and committed certain overt acts in furtherance of the conspiracy. (Sec. 371, Title 18 U.S.C.A.)

Anderson entered a plea of guilty to these charges. Davis, upon his plea of not guilty, was tried, convicted by a jury and sentenced. Anderson was called by the Government as a witness at the trial and testified against Davis. Davis has appealed.

The sufficiency of the evidence to support the conviction of Davis is unchallenged. His contentions are that he did not have a fair trial because (1) inadmissible and prejudicial evidence was received at the trial, and (2) the court made improper and prejudicial remarks during the trial.

It is unnecessary to state in complete detail the evidence adduced at the trial. We have had recourse to the original as well as the printed record and know all that occurred at the trial. According to the evidence of the Government, it appeared that Davis in June and July, 1954, was operating a barbecue place or cafe and a house of prostitution, adjoining it, in Minot, North Dakota; that Anderson, his co-defendant, called him long distance from Saginaw, Michigan, in June, 1954, with respect to having a woman named Maxine, with whom Anderson had been living, come to Davis' place in Minot for purposes of prostitution; that Maxine went from Saginaw, Michigan, to Minot and engaged in prostitution for Davis, dividing her earnings as a

prostitute with him; that while Anderson was in Minot, on or about June 21, 1954, he arranged with Davis to try to find white girls for him; that Anderson was to telephone Davis if successful; that on or about July 7, 1954, Anderson met in Minneapolis a twenty-year old white girl known as Mickey, who, he advised Davis by telephine, would come to Minot to engage in prostitution for him; that Davis told Anderson he would send money for her fare, and wired Anderson twenty dollars; that Anderson purchased a bus ticket for Mickey from Minneapolis to Minot, so she could go there and work for Davis as a prostitute and also send Anderson money out of her earnings; that Mickey went to Minot and met the colored girl Maxine, who told her she was expected; that Maxine took her to the home of Davis nearby; that Davis explained the rules of the house and gave her a rent receipt for $40.00, although she paid him nothing; that Maxine and Mickey and another woman acted as waitresses at the cafe and made their "deals" there and took their patrons or "tricks" to a house adjoining and in front of the cafe, used as a house of prostitution; that Mickey began working as a prostitute the first night she was there; that she was to have half of her earnings as a prostitute; that each girl had an envelope in which she would put her earnings, marking the amount on the outside of the envelope and putting it on a shelf in the kitchen of the cafe; that Mickey became ill, apparently on the day after her arrival, and required medical care; that she and Maxine left for Minneapolis on July 11, 1954, and Mickey did not return; that they were met in Minneapolis by Anderson, who wanted money from Mickey, but that she had none; and that, after searching her purse, Anderson drove her to her mother's home. There was documentary evidence to sub-

stantiate the telephone calls from Anderson to Davis, the bus trip of Mickey from Minneapolis to Minot, and the telegraphing by Davis of the twenty dollars which Anderson received and with which he purchased the bus ticket for Mickey.

The evidence of the Government, at the close of its case, was inconsistent with any conclusions other than that Davis was the operator of a house of prostitution in Minot, and that he had arranged with Anderson, a procurer, to send Mickey from Minneapolis to Minot for purposes of prostitution and had sent money to Anderson to pay for her trip to Minot.

Davis took the stand and testified in his own behalf: that he had lived in Minot since 1943; that he played baseball, coached baseball teams, did cement and carpenter work, acquired tax title real estate and bought old houses and moved them onto it; that he and his wife fixed them up and accumulated what they had; that the houses are in the "colored section" of the City; that he had made it a practice to furnish quarters for colored people coming through Minot; that he owned the building in which his cafe, known as the Bar-B-Q, was located, and operated it; that he first saw Maxine on June 8 or 9, 1954, when she called up from the station and asked for a room until she could get married in August to a porter on the Northern Pacific; that he gave her a room, for which he charged $11.25 per week; that she worked as a waitress at the cafe from ten o'clock at night until morning, when it closed; that she never told him that she was a prostitute; that he got no money from her for prostitution; that she put no money in an envelope and left no envelope on a shelf in the cafe.

Davis further testified that he first met Anderson, his co-defendant, in Minot, about June 20 or 21, 1954; that

Anderson came to visit Maxine; that he said he was going out on his run from St. Paul to Seattle on the Northern Pacific and wanted Maxine to stay until he got located; that he (Davis) had never talked to Anderson over the telephone or otherwise before that time in Minot; that Anderson told Davis that when he got back from his run he would buy an outboard motor for Davis at a reduced price, bring it to Minot and pick up Maxine and take her to Minneapolis; that they talked about fishing; and that Davis said he would send him some of the money for the motor, but not all of it.

With respect to Mickey, Davis testified that she was brought to his back door by Maxine, who said Mickey was a friend who wanted a room; that Mickey told him she was colored and Indian and wanted a place to stay until she obtained a divorce from a cruel husband; that he told Mickey he would have to have money in advance and she paid him $40.00, for which he gave her a receipt for room rental from July 9, 1954, to August 9, 1954; that Mickey arrived in Minot on July 9; that Davis' wife got a doctor for Mickey on the day of her arrival; that she left Minot by train on July 11, without asking that any of her rental money be refunded; that she said she might be back, and he held her room for her; that Maxine left with Mickey, but returned [about July 18, 1954]; that Mickey was never in the cafe as a waitress or at all; that he knew nothing about her being a prostitute in Minot; that he was not running a house of prostitution; that he never told Anderson that he wanted a white girl for any purpose, and had no conversation with him about Mickey; and that the money he sent Anderson under an assumed name was for an outboard motor.

Davis also testified, on direct examination that in June and July, 1954, his wife was helping in the cafe; that at

night, around 12:00 or 12:30, she would come over and help in the kitchen, and on some nights would stay until the cafe closed; that he did not divide earnings from any source with any woman except his wife, "as my wife and I own these properties together and what came in was our joint money"; that the cafe was about a half block from his home; that the house which the Government's testimony showed to be a house of prostitution was rented during June and July of 1954 to a Mrs. Rogers for $45.00 a month; that he had done nothing he knew of to assist in transporting any woman intending that she should enter a house of prostitution; that if the house in front of the cafe was one, he did not know what was going on there; that his property has become valuable and that since it has increased in value "they have been trying to move us all out of there"; and that he has had some trouble with police officers who were trying "to down me a little bit so as to make me sell."

During his direct examination, Davis was asked by his counsel what, if any, trouble he had had with the law—whether he had been convicted of any felony "before". He answered, "No, I haven't." He was asked, "Have you had some trouble out there in Minot?" His answer was: "Well, I drink a little. I have been arrested." On cross-examination, Davis testified, without objection, that he had been arrested many times for drunkenness. He was asked whether his wife, Ann M. Davis, engaged in prostitution. He said, "No." He was then asked whether she was not arrested for prostitution in 1950 or 1951. The question was objected to as improper, immaterial and prejudicial. The objection was overruled. Davis was then asked, "Talking about your wife, she was arrested and convicted for en-

gaging in prostitution?" The question was not objected to. He answered, "She was not."

The following question was then asked: "Isn't it a fact, Mr. Davis, that on May 1, 1950, Ann Davis, Mrs. Saul Davis. pled guilty in Court in Minot, North Dakota, of keeping a disorderly house at 318 Third Street Southwest, Minot, North Dakota [Davis' residence]?" No objection was taken to the question. He answered that he was in Hobbs, New Mexico, and knew nothing about that. Davis was asked whether on July 27, 1950, his wife was arrested "for soliciting for prostitution at 318 Third Street Southwest." That was objected to as improper cross-examination. After some colloquy between court and counsel, the court said to counsel for Davis, "You object to the whole subject matter, don't you?" Counsel's answer was: "No. Just referring to arrests and particularly someone not the witness." The objection was overruled. Davis was then asked, "On July 27, 1950, isn't it a fact that Ann M. Davis, your wife, was arrested for prostitution?" The question was not objected to, and his answer was, "I was in Hobbs, New Mexico." The next question was: "That was July 27th. On May 1, 1950, didn't your wife plead guilty for the operation of keeping a disorderly house at 318 Third Street Southwest?" Davis' answer was, "I was in Amarillo, Texas."

During a recess at that stage of the trial and in chambers, counsel for Davis moved that all testimony relative to Ann Davis' convictions be stricken and the jury be instructed to disregard it, and that all reference to any police records be stricken. After a discussion, the court announced that a ruling would be deferred.

On redirect examination Davis testified that his wife had at one time been charged with prostitution but had been acquitted. On recross-examination, Davis was asked the following question: "And I will ask you if it has now come to your remembrance the question of the fact she was arrested for operating a disorderly house at 318 Third Street Southwest, your home?" This was objected to as improper cross-examination. The court then said: "At the present condition of the record I am going to sustain all of Mr. Tautges' [counsel for Davis] motions made during recess. They can be renewed at an appropriate time by the Government lawyer, but now all of that testimony as to her being held for prostitution on the various charges is sustained. *The jury will disregard it all.*"

Thereafter Government counsel, in chambers, made an offer to prove the arrests and convictions of Davis' wife for prostitution, about which inquiry was made in the cross-examination of Davis, by the official police records of the Police Department of Minot, North Dakota, to show that the cross-examination of Davis relative thereto was made in good faith and as tending to show that his wife, as late as 1950, was engaged in operating a house of prostitution, and for the purpose of proving the kind of place he and his wife were operating in Minot. The offer of proof was in all respects denied.

The court denied a motion for a judgment of acquittal. There were no requests for instructions. Counsel for the Government in his argument to the jury made no allusions to the arrests or convictions of the wife of Davis and never referred to her in any way. Counsel for Davis, in his argument, said to the jury:

"Now, there have been indications in the trial here about possible other offenses. There was some reference made to some possible arrests. Well, of course, an objection was taken to that and you are going to be instructed by the Court to disregard any reference to any difficulty that may have been intimated that Mrs. Davis had. That evidence is not before you and the Court will tell you that you must reject it without qualification."

The trial court, in instructing the jury, said:

"You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the Court. Such evidence is to be treated as though you never had heard it, particularly the testimony with reference to the wife of the defendant being arrested for prostitution, which was admitted by the Court and afterwards stricken out."

No objections were made or exceptions taken to the charge of the court, and no corrections or additions were suggested or asked for.

This Court is now asked to rule that the cross-examination of Davis with respect to his wife's difficulties with the local police was so improper and prejudicial as to vitiate the conviction of Davis and to entitle him to a new trial, notwithstanding that the evidence elicited from Davis in that regard was stricken from the record and the jury instructed to disregard it.

It cannot be said that evidence that the wife of Davis had engaged in prostitution would have no tendency whatever to characterize the establishment he was operating with her help, the earnings from which, according to his testimony, were divided between them. According to the evidence of the Government, those earnings included earnings derived from the prostitution of the women who worked

in the cafe. Davis should not have been asked about his wife being arrested for prostitution, since an arrest is in the nature of a mere accusation and is not evidence that the person arrested has committed the offense charged. As this Court said in *Pittman v. United States,* 42 F. 2d 793, 797, "Many innocent men are arrested," and, "The lay mind does not stop ordinarily to distinguish between accusation of crime and conviction thereof." See, also, *Coulston v. United States,* 10 Cir., 51 F. 2d 178, 182. However, it is to be noted that Davis, on his direct examination, first injected the question of arrests into the trial.

The questions about the convictions of the wife of Davis in the police court of Minot stand in a somewhat different situation, since they had some tendency to show what kind of a place it was probable that Davis and his wife were maintaining. It may be doubtful whether the questions about convictions constituted improper cross-examination. A trial court has a rather broad discretion with respect to cross-examination of a witness as to collateral matters. Mr. Justice Sutherland, sitting as a Circuit Justice in the case of *United States v. Manton,* 2 Cir., 107 F. 2d 834, 845, said:

"• • • The office of cross-examination is to test the truth of the statements of the witness made on direct; and to this end it may be exerted directly to break down the testimony in chief, to affect the credibility of the witness, or to show intent. The extent to which cross-examination upon collateral matters shall go is a matter peculiarly within the discretion of the trial judge. And his action will not be interfered with unless there has been upon his part a plain abuse of discretion. 3 Wharton's Criminal Evidence (11th Ed.) § 1308. See *Alford v. United States,* 282 U. S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624. • • •"

See, also, *Glasser v. United States*, 315 U. S. 60, 83; *Lovely v. United States*, 4 Cir., 175 F. 2d 312, 314, and *Hewitt v. United States*, 8 Cir., 110 F. 2d 1, 8-9.

We think that the cross-examination of Davis, in so far as it may have been improper, does not require a reversal of his conviction. The record shows that counsel for the Government acted in good faith and in the belief that the cross-examination was proper. He was in a position to establish that the wife of Davis had been arrested and convicted of prostitution in Minot.

It is true, as this Court said in *Salerno v. United States*, 61 F. 2d 419, 424, that, "When, in the prosecution of a defendant, counsel for the government indulges in unfair and improper cross-examination, the only purpose of which is to degrade the defendant and to prejudice the jury against him, the government, upon appeal, will not ordinarily be heard to say that the methods which were used did not have the effect which they were obviously intended to have." See, also, *Echert v. United States*, 8 Cir., 188 F. 2d 336, 341-342. In the instant case the cross-examination which is complained of was not indulged in for the sole purpose of degrading Davis. The fact that the cross-examination of a defendant exceeded the bounds of propriety does not call for reversal unless it was prejudicial and amounted to a denial of some substantial right of the defendant. *Morgan v. United States*, 8 Cir., 98 F. 2d 473, 476-477 and cases cited.

In the instant case, the cross-examination elicited from Davis little, if any, evidence of a damaging character, and the trial court struck out all such evidence and instructed the jury to disregard it. We have no right to assume that the jury did not follow the directions and instructions of the court. In *Dolan v. United States*, 218 F. 2d 454, 460, this Court said:

"The general rule is that where evidence is erroneously admitted the subsequent striking of it from the case, accompanied by a clear and positive instruction to the jury to disregard the evidence, cures the error. But if the evidence is of such an exceptionally prejudicial character that its withdrawal from the consideration of the jury cannot remove the harmful effect caused by its admission, a new trial will be granted."

The issues whether Davis knowingly participated in inducing the girl Mickey to travel to Minot to engage in prostitution and whether he and Anderson by concerted action brought that about, were simple and understandable issues. It is not conceivable to us that the improper cross-examination of Davis, and the evidence elicited therefrom, which the jury was instructed to disregard, contributed to his conviction. If Davis was not satisfied that the instruction of the court directing the jury to disregard the evidence complained of was sufficiently clear and positive, he should have asked the court for a further instruction in that regard. When a party might have had all that he was entitled to in the way of instructions from the trial court, he is not in a position to complain of the court's instructions to which no exception was taken. *Pennsylvania Railroad Co. v. Minds*, 250 U. S. 368, 375; *Hall v. Aetna Life Ins. Co.*, 8 Cir., 85 F. 2d 447, 450-451.

"Whether prejudice results from the erroneous admission of evidence at a trial is a question that should not be considered abstractly or by way of detachment. The question is one of practical effect, when the trial as a whole and all the circumstances of the proofs are regarded."

Williams v. United States, 8 Cir., 265 F. 625. See and compare, *Holmes v. Goldsmith*, 147 U. S. 150, 164; *Kotteakos v. United States*, 328 U. S. 750, 763-767: *Lutwak v. United*

States, 344 U. S. 604, 619-620; *Miller v. United States,* 8 Cir., 21 F. 2d 32, 36-38, certiorari denied 276 U. S. 621; *Hewitt v. United States,* 8 Cir., 110 F. 2d 1, 9 and cases cited; *Snead v. United States,* 4 Cir., 217 F. 2d. 912, 915.

The remarks of the trial court which Davis contends made his trial unfair were not directed to him but to his counsel, and were not intended or calculated to prejudice Davis in any way. The entire subject of asserted prejudice resulting from remarks of a trial court to counsel for a defendant is adequately dealt with in *Goldstein v. United States,* 8 Cir., 63 F. 2d 609, 612-614. On the authority of that case, the contention that the trial court's remarks in the instant case amounted to prejudicial error is overruled. See and compare, *United States v. Warren,* 2 Cir., 120 F. 2d 211, 212; *Throckmorton v. St. Louis-San Francisco Railway Co.,* 8 Cir., 179 F. 2d 165, 169; *Illinois Terminal R. Co. v. Creek,* 8 Cir., 207 F. 2d 475, 480; *Glasser v. United States,* 315 U. S. 60, 83.

The judgment appealed from is affirmed.

VAN OOSTERHOUT, Circuit Judge, dissenting.

I am unable to agree with the majority opinion and therefore dissent. The issues and facts are set out in the majority opinion.

The district attorney in his cross-examination of the defendant on three separate occasions at widely separated intervals asked the defendant in substance whether his wife had been arrested for prostitution on designated dates in 1950. Such questions were objected to as improper impeaching questions and improper cross-examination upon subject matter not covered on direct examination, and on

the further ground that the wife's arrests were not a proper subject of inquiry. The defendant also moved for a mistrial because of the prejudicial questions. The majority, citing adequate supporting authority, correctly concluded that Davis should not have been asked about his wife's arrests. The majority opinion then goes on to say that Davis first injected the question of arrests into the trial. It is true that Davis on direct examination admitted that he had been arrested many times for intoxication. Mrs. Davis was not a party to this action, nor was she a witness at the trial. There is nothing in defendant's direct examination which would open the field of cross-examination to include Mrs. Davis's arrests. The district attorney also on cross-examination over appropriate objections questioned the defendant about his wife's arrests and conviction for offenses in 1950. The Government by offer of proof which was rejected proposed to show that Mrs. Davis on May 1, 1950, entered a plea of guilty in police court at Minot, North Dakota, to a charge of keeping a house of ill fame in April of 1950 contrary to ordinance of the City of Minot, and was sentenced to pay a fine of $45. It is noted that the defendant was a professional baseball player and was so engaged in April 1950 at Hobbs, New Mexico. A further offer was made to show that Mrs. Davis was convicted in the Minot police court on a charge of prostitution in July 1950. However, this case was appealed to the State court, and the trial there resulted in an acquittal.

The Mann Act and conspiracy charges involved in the present case arose out of events alleged to have occurred in 1954. The trial court, after repeatedly overruling defendant's objections to the cross-examination pertaining to his wife's alleged convictions and arrests, ultimately sus-

tained defendant's motion to strike all such testimony and, as stated by the majority, advised the jury to disregard such testimony. The following colloquy between defendant's counsel and the court then took place:

"Mr. Tautges: Will Your Honor advise the jury to disregard it?

"The Court: I just said that. I am going to treat this record as is, not as you may hope to prove it."

It is difficult to comprehend just what idea the court intended to convey by the last sentence quoted and what meaning the jury might give to such a statement. It certainly made less clear the previous statement of the court that the jury should disregard the disputed testimony. At one point while Government counsel was cross-examining the defendant on his wife's arrests, such attorney had before him the records pertaining to the arrests. The defendant's counsel objected to Government counsel reading from such records not in evidence. The following discussion then took place:

"The Court: What are those instruments that you have there that prove this thing?

"Mr. Dim: These are police records, Your Honor.

"The Court: Police records. Why don't you put them in evidence?

"Mr. Dim: I will when the proper time comes, Your Honor."

The foregoing conversation in the presence of the jury tended to place before the jury and emphasize the testimony pertaining to Mrs. Davis's 1950 criminal record.

I am convinced that the testimony as to Mrs. Davis's conviction and arrests in 1950 was improper cross-examination and that the trial court was right when it ultimately ex-

cluded such testimony. It is true, as stated by the majority, that generally the trial court has a large discretion with respect to the scope of cross-examination of a witness as to collateral matters. However, this discretion is subject to limitation. In *Harrold v. Territory of Oklahoma,* 8 Cir., 169 Fed. 47, a case often quoted and referred to, this court states in part (pp. 51, 52, and 53):

"Statements in the opinion of courts are called to our attention to the effect that the limit of cross-examination is discretionary with the trial court, but it is only discretionary without the limits of the right of the party against whom a witness is called to a full and fair cross-examination of him upon the subjects of his direct examination, and the right of the party in whose behalf he testifies to restrict his cross-examination to the subjects of his direct examination. * * *

"The converse of this rule is equally controlling. The party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error. * * *

" * * * But the line of demarcation which limits a rightful cross-examination is clear and well defined, and it rests upon the reason to which attention has been called. It is the line between subjects relative to which the witness was examined upon the direct examination and those concerning which he was not required to testify. * * *"

See also, *Gideon v. United States,* 8 Cir., 52 F. 2d 427, 429; *Havener v. United States,* 8 Cir., 15 F. 2d 503, 506; *Tucker v. United States,* 8 Cir., 5 F. 2d 818, 823; *Salerno v. United States,* 8 Cir., 61 F. 2d 419, 423; *Lovely v. United States,* 4 Cir., 175 F. 2d 312, 313. Moreover, even if the reception of

the disputed testimony was within the trial court's discretion, the trial court's final conclusion was that such testimony should be excluded.

Error was committed in permitting the defendant to be cross-examined as to his wife's alleged offenses in 1950. As hereinabove stated, the error was repeated a number of times and thus the improper testimony was unduly emphasized. The withdrawal of such testimony in the manner it was here accomplished did not remove the effect of the evidence erroneously received. As stated by Justice Jackson in his concurring opinion in *Krulewitch v. United States,* 336 U. S. 440, at 453:

"The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf. Blumenthal* v. *United States,* 332 U. S. 539, 559, all practicing lawyers know to be unmitigated fiction."

The question of whether the error hereinabove discussed is prejudicial is a very close one. I fully agree with the majority that there is ample evidence outside of the disputed cross-examination to sustain the convicton. However, it is usually extremely difficult to determine the effect of specific testimony on a jury. The test to be applied in determining whether the error committed is prejudicial is fully discussed by Justice Rutledge in *Kottcakos* v. *United States,* 328 U. S. 750, where it is stated at p. 765:

"• • • But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather,

even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

See also *Echert v. United States,* 8 Cir., 188 F. 2d 336; *Krulewitch v. United States,* supra.

The crucial witnesses for the Government in this case were Anderson who pleaded guilty to the offenses charged in the present indictment, and two admitted prostitutes, all of whose testimony was squarely contradicted by the defendant. True, there was corroboration by disinterested witnesses as to some of the Government testimony, such as that relating to transportation and phone calls. After examining the entire record as a whole, I am unable to say with certainty that the injection of the wife's alleged offenses into the record might not substantially affect the verdict. Further, it seems apparent to me that the Government counsel knew, or should have known, that he was going beyond the bounds of proper cross-examination in pressing the questions relative to the wife's arrests in 1950. In *Salerno v. United States,* supra, at p. 424, this court said:

"The general rule is that such improper cross-examination constitutes reversible error. * * * When, in the prosecution of a defendant, counsel for the government indulges in unfair and improper cross-examination, the only purpose of which is to degrade the defendant and to prejudice the jury against him, the government, upon appeal, will not ordinarily be heard to say that the methods which were used did not have the effect which they were obviously intended to have. * * *"

See also *Havener v. United States,* supra; *Echert v. United States,* supra; *State v. Comes,* 245 Iowa 485, 62 N. W. 2d 753, 757.

Except to the limited extent hereinabove noted that the inadvertent remarks of the trial judge tend to emphasize the testimony improperly received on defendant's cross-examination, I would agree with the majority that there was nothing in the record to support defendant's contention that the remarks of the trial court deprived the defendant of a fair trial.

I would reverse the judgment of conviction and remand the case to the District Court for a new trial.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 620 Misc.

SAUL HENRY DAVIS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE A PETITION FOR A COMMON LAW WRIT OF CERTIORARI AND PETITION FOR A COMMON LAW WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE MOTION

A petition for a common law writ of certiorari was filed in this Court in the above-entitled case on March 10, 1956. The judgment in the Court of Appeals was entered on January 23, 1956 (Pet. 17). Failure to file a petition for a writ of certiorari under 28 U.S.C. 1254(1) within the thirty-day time limit set by Rule 22(2) of this Court is stated by petitioner to have been caused by the

distance involved between his resilence in Minot, North Dakota, and that of his atorneys in St. Paul, Minnesota, and by illness (unspecified as to person or nature), so that it was impossible to consider fully whether to petition for certiorari in this case (Pet. 1-2). No reason is given for failure to seek an extension of time under Rule 22(2).

Petitioner invokes the jurisdiction of this Court under the "all writs" section of the Judicial Code, 28 U.S.C. 1651(a)[1] to settle the question of whether he was denied a fair trial because of improper cross-examination (Pet. 2). The traditional use of the common law writ of certiorari has been as an auxiliary process to supply imperfections in the record of a case already before the court, and, in cases of imperative necessity, as a means of correcting excesses of jurisdiction and furthering justice in other kindred ways. It may not be used as a substitute for the statutory writ of certiorari to correct mere errors committed in the exercise of a lawful jurisdiction. *United States* v. *Beatty*, 232 U. S. 463, 467-468; *United States* v. *Dickinson*, 213 U. S. 92, 102; *Whitney* v. *Dick*, 202 U. S. 132, 137-141; *In re Chetwood*, 165 U. S. 443, 461-462; *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 379-380; Cf. *United States Alkali Assn.* v. *United States*, 325

[1] 28 U.S.C. 1651(a) provides:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

U. S. 196, 202-203; *Ex parte Vallandigham*, 1 Wall. 243, 249-251; *Ex parte Gordon*, 1 Black 503. And see Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, revised by Wolfson and Kurland (1951 ed.), Section 309, pp. 582-587.

Petitioner is not here attacking the jurisdiction of the courts below, and it is obvious that he seeks the common law writ of certiorari under 28 U.S.C. 1651(a) only as a substitute for the statutory writ of certiorari under 28 U.S.C. 1254(1) for which he failed to apply in time. If the time limits of the rules can be disregarded on as flimsy a basis as is here alleged, those time limits would have no real significance.

For these reasons, we respectfully submit that the motion for leave to file a petition for a common law writ of certiorari should be denied.[2]

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MARCH, 1956.

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[2] If the motion should be granted, we request an opportunity to file a brief in opposition to the petition.

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